IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 471 of 1995

with

CRIMINAL APPEAL No 245 of 1995

For Approval and Signature:

Hon'ble MR.JUSTICE N.G.NANDI
and
Hon'ble MR.JUSTICE D.P.BUCH

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

MANJULABEN WD/O.KISHORGAR

Versus

STATE OF GUJARAT

Appearance:

1. Criminal Appeal No. 471 of 1995
   MR DM THAKKAR for Petitioner No. 1
   MR HARSHAD J SHAH for Petitioner No. 1
   MR AJ DESAI Ld. APP for Respondent No. 1
2. Criminal Appeal No. 245 of 1995
   MRS SHILPA J UNWALLA for Petitioner No. 1
   MR AJ DESAI Ld. APP for Respondent No. 1

CORAM : MR.JUSTICE N.G.NANDI

and

MR.JUSTICE D.P.BUCH

Date of decision: 04/09/2002

ORAL JUDGEMENT

(Per : MR.JUSTICE D.P.BUCH)

1. These are the two Criminal Appeals under Section 374(2) of the Criminal Procedure Code,1973 (for short "Code") challenging the judgement and order of conviction recorded on 15.3.1995 by the learned Additional Sessions Judge, Kutcch at Bhuj in Sessions Case No. 1 of 1992, under which the learned Additional Sessions Judge found the said two appellants convicts guilty for the offences punishable under Sections 302 and 201 read with Section 114 of the Indian Penal Code. The learned trial Judge also directed the appellants to undergo RI for life and also directed each of the two appellants to pay fine of Rs.1000/-. In default of payment of fine, the learned trial Judge directed each of the appellants to undergo further SI for one month for an offence punishable under Section 302 read with Section 114 of the Indian Penal Code. With respect to offence punishable under Section 201 of IPC, the learned Judge directed that each of the two appellants shall undergo RI for a period of 7 years and further directed each of the two appellants to pay fine of Rs.1000/-. In default of payment of fine, each of the appellants were directed to suffer further SI for one month. It was further directed that both substantive sentences be run concurrently. The learned trial Judge also directed to dispose of the muddamal articles.

2. The trial Court has tried these two appellants in Sessions Case No. 1 of 1992. The appellant in Criminal Appeal No. 471 of 1995 Manjulaben, widow of Kishorgar was accused no.1 in the said Sessions Case No.1 of 1992, whereas, Ramji Rava Koli, the appellant in Criminal Appeal No.245 of 1995 was accused no.2 in the said Sessions Case No.1 of 1992. Therefore, for the sake of convenience, Manjulaben - appellant in Criminal Appeal No. 471 of 1995 will hereinafter be referred to as "accused no.1", and Ramji Rava Koli, the appellant in Criminal Appeal No. 245 of 1995 will hereinafter be referred to as "accused no.2".

3. The facts of the case of the prosecution may briefly be stated as follows :

3.1 Accused no.1 was staying with her husband at Malara Mahadev Temple at village Meghpar, Taluka - Anjar

of Kuttch district. The deceased was having agricultural land and he was cultivating the said land. So far as accused no.2 is concerned, he was working as watchman and it is a matter of record that he used to sleep on the ota of deceased or on the ota of Malara Mahadev Temple. From the sketch produced on record vide Exh.37, at page 259, it is clear that the Malara Mahadev Temple is at a distance of about 41 feet from the residence of the accused no.1 and the deceased. The said house, as shown in the said sketch, is surrounded with other agricultural lands belonging to different persons; the land of Kankuben is on the western side; the land of Pratapsinh is on the southern side, then on northern side there is an entrance. It appears from the said sketch that there is an entry through the said entrance on the northern side and there is a temple of the Malara Mahadev on the western side and then, the house of accused no.1 as well as of the deceased is on the southern side. The said position described in the said sketch, vide Exh.37, at page -259, is not very much in dispute, and it appears that it was also not disputed before the trial Court. The prosecution case before the trial Court was that accused no.1 had married with the deceased before about 14 years and they were staying together in the aforesaid house described hereinabove. Out of the said married life, they had four children and all of them were staying together in the said house with accused no.1 and deceased. The eldest son is Kirangar, who was 13 years of age at the relevant point of time.

3.2 It was also the case of the prosecution that accused no.2 used to work as a Watchman in the field of Gopalbhai which is adjacent to the aforesaid Malara Mahadev Temple and, therefore, he had occasion to come to the said temple. Since the said temple was very near to the house of the deceased and accused no.1, accused no.1 had close relations with accused no.2. That thereafter, the land of deceased was sold for a sum of Rs.7,70,000/-. Out of the said sale proceeds, some amount was placed in the Bank and from the remaining amount, a tractor and ambassador car were purchased, a house was constructed and ornaments were also purchased. It is also a matter of record that accused no.2, at times, used to sleep at the residence of accused no.1 and even in absence of deceased husband of accused no.1, accused no.2 used to come to sleep there and, therefore, accused no.1 had developed good relations and the said relations resulted into extra marital relations also. It was also the case of the prosecution that deceased used to harass accused no.1 and it created some illwill for the deceased and, therefore, on 1.7.1991, at about 11.00 p.m., the deceased

had come to the house in drunken state and started beating accused no.1. Therefore, accused no.1 was frightened and she had hidden herself in a room of the said house. The deceased followed her and as accused no.1 could not be traced out, the deceased had slept on the ota outside the said house and at that time, he had put on a knicker and vest. Thereafter, accused no.2 arrived there, and accused no.1 informed him that her husband had beaten her and that it was likely that her husband would further beat her. Therefore, she told accused no.2 to kill him. That therefore accused no.2, who had an axe with him, had dealt four to five blows of axe on the neck and head of the deceased and due to the said injuries, the deceased died on the spot. Thereafter, both the accused discussed as to how the dead body of the deceased be disposed of. That, ultimately they decided to dig a pit by the side of the said temple and to burry the dead-body of the deceased in the said pit. That thereafter, they inquired from the surroundings if some one was present there and thereafter, they dug a pit by the side of the said temple and dragged the deceased on a jute bag and thereafter, the dead body of the deceased was wrapped in the said jute bag and buried in the said pit. That thereafter dust was laid thereon and even the stones and wooden pieces were laid on the said pit. That blood stains lying around the otta, were also cleaned. That the Axe, which was used in the said offence, was thrown away by accused no.2 in the well which was situated near the temple. That thereafter also, both the accused persons continued to stay together in the said house. That after sometime, the elder brother of the deceased, Parshottamgar and other persons used to make inquiry about the deceased and ultimately, an information was also given to the police indicating that the deceased was missing, and there was some doubt about the illicit relationship between the two accused. On receiving the said information, accused no.2 ran way from the said place and accused no.1 continued to stay at Malara Mahadev Temple.

3.3 It was also the case of the prosecution that thereafter, the mother of accused no.1 arrived there at the temple and children of accused no.1 had gone away with the mother of accused no.1 to Anjar. That thereafter, accused no.1 also walked down to the main road and by rickshaw she had gone to Anjar Railway Station where she met accused no.2 and both of them had gone to village Rapar and Anjar and thereafter, they went to village Dhrag on foot where they stayed for two to three days. That when the police arrived there, they

again left the said village and went to village Kuk. Thereafter, they again returned to Anjar. Thereafter, accused no.1 filed FIR against two accused persons and disclosed as to how the incident took place and as to how the dead-body of the deceased was buried. Thereafter, at her willingness the dead-body of the deceased was brought out from the said pit by removing the wooden pieces and other things lying on the said pit. The Postmortem was undertaken in respect of the dead-body. It was found that the dead-body was wrapped in the jute bag and a knicker and vest were there on the dead-body. The dead-body was seized in presence of panchas and thereafter, Postmortem was undertaken. That thereafter, the said dead-body was referred for further experts' opinion and on receiving the opinion, it was kept with police investigation papers. Further investigation was undertaken and thereafter, both the accused were arrested and after completion of investigation, recording of the statements of witnesses and obtaining further material on record, the Investigating Police Officer submitted charge sheet against the two accused persons before the Court of learned Judicial Magistrate First Class at Anjar.

4. The learned Judicial Magistrate First Class, Anjar registered the said case and supplied the copies of police investigation papers to both the accused persons. This being a case involving an offence punishable under Section 302 of IPC and being a case exclusively triable by the Court of Sessions, the learned JMFC committed the case to the Sessions Court and also sent the investigations papers to the Sessions Court where it was registered as Sessions Case No. 1 of 1992.

There also the learned Judge inquired if the two accused persons had been supplied with the copies of police papers and when the Judge was satisfied that the papers were supplied, he framed the charge at Exh.1, to which the two accused pleaded not guilty and claimed to be tried. Therefore, the learned Judge proceeded to record evidence in the case. During the course of trial, the prosecution has examined as many as 23 witnesses, a list of which is reproduced for ready reference as under :

(i) Witness No.1 Rajubhai Bhagwandas (Panch) Exh.11

(ii) Witness No.2 Motigar Ramgar (Panch) Exh.13

(iii) Witness No.3 Jaymal Rajabhai (Panch) Exh.7

(iv) Witness No.4 Jadavji Vaghji (Panch) Exh.19

(v) Witness No.5 Mukesh Ghanshyambhai (Panch) Exh.21

(vi) Witness No.6 Jayantilal Hansaraj Thakkar Exh.26

(vii) Witness No.7 Jaluben Damjibhai Exh.28

(viii) Witness No.8 Valbhai Nayu Exh.29

(ix) Witness No.9 Pruthvirajsing Jasubha Exh.30

(x) Witness No.10 Amad Khamisha Chavda(Panch) Exh.31

(xi) Witness No.11 Madhavsinh Ratansinh Jadeja, (Medical Officer R.M.C.) Exh.36.

(xii) Witness No.12 Parshottamgar Arjangar Gusai Exh.39

(xiii) Witness No.13 Dahya Kana Exh.43

(xiv) Witness No.14 Rajendra Bahadursinh Chauhan Exh.44

(xv) Witness No.15 Bhajansinh K. Khasla Exh.45

(xvi) Witness No.16 Dr. Harimangal Mangal Exh.48

(xvii) Witness No.17 Navinbhai Amrutlal Vyas Eh..51

(xviii) Witness No.18 Krishnaben Khimji Exh.54

(xix) Witness No.19 Kirangar Kishorgar Exh.51

(xx) Witness No.20 Premji Dharamshi Kulani Exh.60

(xxi) Witness No.21 Dilipkumar Kapilray Vaishnav Exh.61

(xxii) Witness No.22 Vijay Pragji Rathod Exh.70

(xxiii) Witness No.23 Naranbhai Narrotamdas Patel Exh.72

5. After concluding the evidence produced by the prosecution, the learned trial Judge recorded further statement of both the accused persons under Section 313 of the Code. Thereafter, the learned Judge heard oral arguments submitted by the learned advocates for the parties and thereafter, leaned trial Judge found that the prosecution had proved the case against both the accused persons beyond the reasonable doubt. Therefore, the learned trial Judge recorded the judgment and order of conviction and after hearing both the accused persons on the quantum of punishment, inflicted the aforesaid

punishment on both the accused persons.

6. Being aggrieved by the said judgement and order of conviction of the learned trial Judge, two accused persons have preferred these two appeals under Section 374(2) of the Code.

7. Accused no.1 has taken up a contention in her appeal being Criminal Appeal No. 471 of 1995 that the trial Court has not properly read the evidence and there was no direct evidence to connect accused no.1 with the offence in question. That she has been falsely implicated in the case and that there was no motive proved against her. That the trial Court has erred in relying on the FIR, and the said FIR was technically not admissible in evidence and yet, the trial Court had read the same as a piece of evidence against accused no.1. That this being a case of circumstantial evidence, the trial Court ought to have insisted on evidence of motive which was absent in the case and, therefore, the trial Court ought to have acquitted accused no.1. That the trial Court has erred in relying upon the evidence of the son and the brother of the deceased. Therefore, the judgement and order of conviction recorded by the trial Court are illegal, erroneous and deserve to be set aside. Accused no.1, therefore, prayed that the present appeal be allowed and conviction and sentence against accused no.1 be quashed and set aside, and accused no.1 be ordered to be acquitted out right.

Almost similar contentions have been raised by accused no.2 in his appeal being Criminal Appeal No. 245 of 1995.

8. On receipt of the two appeals, they were ordered to be admitted. Accused no.1 was on bail during the course of the trial and after the admission of the appeal, accused no.1 was granted bail in her appeal. So far accused no.2 is concerned, he was in jail right from the beginning and thereafter, he was granted furlough for a period of 14 days from 21.4.1997 and he was required to surrender on 6.5.1997. However, accused no.2 did not surrender in time and till today, he has not surrendered and was not apprehended by the police.

9. In response to the notice of admission of the two appeals, Mr. A.J.Deai, learned APP appears on behalf of the State. We have heard the arguments advanced at length by the learned advocates for the parties and perused the records. In fact, learned advocates have taken us through the judgement as well as through oral

and documentary evidence on record.

So far accused no.1 is concerned, it has been argued at length by Mr. D.M.Thakkar, that there is no evidence on record to show that accused no.1 was involved in the offence and that she has been falsely implicated and convicted on evidence which was not there. It has also been argued that in fact, there was no evidence against accused no.1 before the trial Court for recording conviction against accused no.1. It is, therefore, prayed that so far accused no.1 is concerned she deserves acquittal.

10. Now, it is a fact that the offence has been registered at Adipur Police Station on 23.8.1991, the FIR of which is produced at Exh.73. The said FIR has been filed by accused no.1 herself. Therefore, an attempt has been made to argue that this FIR has been registered at the instance of accused no.1 and, therefore, the FIR is inadmissible as a whole and, therefore, it should be overlooked totally. It has also been argued that the trial Court has taken into account this FIR, Exh.73. That since the FIR was not admissible in evidence and since the trial Court has taken into the account the FIR, Exh.73 the entire approach of the trial Court was improper and not according to law. Therefore, the entire observations of the trial Court touching the FIR and around it should be overlooked. It is, therefore, contended that if once the FIR is overlooked and not considered then there is no further evidence on record to connect accused no.1 with the offence in question.

11. Now, it is a matter of record that the FIR, Exh.73, has been admitted in evidence during the course of the evidence recorded by the trial Court. There, it has been stated by accused no.1 that offence took place on 1.7.1991 at 23.00 hours (11.00 p.m.) and the FIR was lodged at 15.00 hours (3.00 p.m.) on 23.8.1991. The FIR has been lodged by accused no.1 against herself and against accused no.2. The main aspect of the FIR, may be briefly stated, is that accused no.1 was staying with her husband and children at village Meghpar near Malara Mahadev Temple. That her marriage took place before about 14 years with the deceased Kishorgar. That they had four children and Kirangar, who is eldest son was aged about 13 years at that point of time. It was disclosed in the FIR that her mother Kankuben used to come to stay with them in the said house, but she had not come there since last about four months. It was further disclosed in the FIR that accused no.2 had come in contact with the deceased since last three years as

accused no.2 was working as a watchman in the field of Gopalbhai, which was adjacent to the said Malara Mahadev Temple. That therefore he frequently used to come to the said house and, therefore, he had developed extra martial relationship with her. That before about six months, the land of the deceased was sold in sum of Rs.7,70,000/- and out of the said amount, Rs.2,70,000/- were placed in a bank and a tractor and ambassador car, and ornaments were purchased from the remaining sale proceeds. That the deceased used to keep handsome cash on hand at the house and, therefore, accused no.2 also used to sleep at the said house very often. That even in the absence of deceased husband of accused no.1, accused no.2 used to come there to sleep at the said house. That the deceased husband used to harass her very often and, therefore, she had created illwill for the deceased. That on 1.7.1991, at about 11.00 p.m., the deceased had come in drunken state and started beating accused no.1 and accused no.1 was frightened and tried to hide herself so that the deceased husband could not trace her out. That as the deceased husband could not trace out her, he slept on the otta of the said house. At that time, he had put on a knicker and vest. That thereafter, accused no.2 arrived there and accused no.1 had told accused no.2 that the deceased had beaten her and it was likely that the deceased would further beat her. That therefore she told accused no.2 to kill the deceased and accused no.2 dealt four to five axe blows on the neck and head of the deceased and due to that, deceased died on the spot. That thereafter, they discussed as to how the dead body of the deceased should be disposed of and thereafter, the dead body of the deceased was buried in a pit, dug by the side of the temple and then, wooden pieces and stones were laid on the said pit. That thereafter, accused no.2 had thrown the said axe in a well nearby the said temple. That thereafter, accused no.1 continued to stay there and accused no.2 also continued to stay with her. But, thereafter the elder brother of the deceased Parshottamgar and other persons made inquiry about the deceased and informed the police and, therefore, accused no.2 ran away, but accused no.1 continued to stay at Malara Mahadev Temple and when her mother arrived there, the children had gone away with her mother and she stared to go on foot towards the road. That on the road, a rickshaw was found and she went to Anjar. It is further disclosed by her that at Anjar Railway Station she met accused no.2 and both of them had gone to village Rapar and from village Rapar they went to village Dhrag at the place of a relation of accused no.2. That thereafter they had also gone to village Kuk and from there, they returned to Anjar and thereafter, accused no.2 had gone

to office of the DSP, but the DSP was not available and thereafter, both had gone to Adipur and there accused no.1 lodged the FIR.

12. At this juncture, Mr. D.M.Thakkar, learned advocate for accused no.1 has argued at length that this FIR is not admissible in evidence as it has been filed by accused no.1. It has also been argued that even if accused no.1 was actually not arrested and made accused in the said offence, she was thereafter arrested in the said offence and therefore also, the said FIR as filed by accused person is not admissible in evidence. Therefore, it must be discarded and overlooked out right.

It is also his argument that this FIR has been lodged by accused no.1 at the instance of the police, and whatever stated in the FIR has actually been written down by the police and it was not actually conveyed by accused no.1 to the police.

13. At this juncture, it would be worthwhile to refer to a decision of the Hon'ble the Supreme Court in the case of Bheru Singh S/o Kalyan Singh Vs. State of Rajasthan, reported in 1994 (2) GLH 304. In paragraph nos.16 and 20, the Hon'ble the Supreme Court has made following observations:

Para.16

A confession or an admission is evidence against the maker of it so long as its admissibility is not excluded by some provision of law. Provisions of Sections 24 and 30 of the Evidence Act and of Section 164 of the Code of Criminal Procedure deal with confessions. By virtue of the provisions of Section 25 of the Evidence Act, a confession made to a police officer under no circumstance is admissible in evidence against an accused. The section deals with confessions made not only when the accused was free and not in police custody but also with the once made by such a person before any investigation had begun. The expression "accused of any offence" in Section 25 would cover the case of an accused who has since been put on trial, whether or not at the time when he made the confessional statement, he was under arrest or in custody as an accused in that case or not. In admissibility of a

confessional statement made to a police officer under Section 25 of the Evidence Act is based on the ground of public policy. Section 25 of the Evidence Act not only bars proof of admission of an offence by an accused to a police officer or made by him while in the custody of a police officer but also the admission contained in the confessional statement of all incriminating facts relating to the commission of an offence. Section 26 of the Evidence Act deals with partial bail to the admissibility of confessions made to a person other than a police officer but we are not concerned with it in this case. Section 27 of the Evidence Act is in the nature of a proviso or an exception which partially lifts the ban imposed by Sections 25 and 26 of the Evidence Act and makes admissible so much of such information, whether it amounts to a confession or not, as relates to the fact thereby discovered, when made by a person accused of an offence while in the police custody. Under Section 164 Cr.P.C. as statement or confession made the course of an investigation, may be recorded by a Magistrate, subject to the safeguards imposed by the section itself and can be relied upon at the trial.

Para.20

Before proceeding further, it would at this stage be also proper to deal with the confessional statement of the appellant recorded under Section 164 Cr.P.C., Ex.P.2 on 14.6.188. In this connection, before adverting to the analysis of this statement made by the appellant Exh.P.2., it would be desirable to examine the statement of the learned judicial Magistrate who recorded the confessional statement Ex.P.2. Shri Tara Chand Soni, Judicial Magistrate recorded the confessional statement under Section 164 Cr.P.C. appearing as P.W.1. He stated that on 8.6.1988 while he was posted as Munsif and Judicial Magistrate First Class, Surajmal Constable submitted an application before him to record the statement of the appellant under Section 164 of Cr.P.C.. The application was produced at the residence of the learned Magistrate since the duty hours of the court were over. The learned Magistrate affixed the case for 9.6.1988 in the Court and directed the police to produce the production warrant of the appellant to show that he was in judicial custody. On 9.6.1988 the

> appellant was remanded to judicial custody and directed to be kept separately from other accused persons and the case was fixed for 13.6.1988, on which date the appellant appeared in his court and stated that he wanted to make a statement. PW 1 went on to depose that he disclosed his status as first class magistrate and cautioned the appellant that "he is free to give or not to give the statement and in case he gives the statement, it may be read against him". The appellant was also told that his statement would be recorded only if he wanted to make it voluntarily and of his own free will. The appellant was given 24 hours time and the Jailer was directed in writing by the Magistrate that the appellant may be allowed to stay in the jail in a place of his own choice so as to enable him to reflect and give a cool though as to whether he wanted to make a confession or not. He assured the appellant that he would not be sent to police custody in case he did not want to make the statement. The appellant was produced before him on 14.6.1988 and on being asked by the Magistrate, the appellant expressed his desire to make the statement. The learned Magistrate took all steps to remove any trace of fear from the appellant and observed the formalities envisaged by Section 164 (3) Cr.P.C., before recorded his statement Exh.P.2 under Section 164 Cr.P.C. The Magistrate went on to depose that the statement was given by the appellant voluntarily and in Hindi and that Exh.P.2 was recorded in the manner given by the appellant.

The aforesaid observations and other observations made in the said decision make it clear that even the motive derived from an FIR, lodged by the accused persons, can be taken into account as a piece of evidence against the accused persons though the said averments may have been made by accused before or after his or her arrest. In other words, even if the FIR has been filed by the accused after his arrest and even if such FIR conveys some sort of evidence with respect to motive for committing a particular offence then also such a fact stated by such an accused person in his or her FIR would be admissible and can be relied upon in accordance with the observations made by the Hon'ble Supreme Court in the said decision.

14. However, a different view has been recorded by a larger Bench of the Hon'ble the Supreme Court in a case

of Aghnoo Nagesia Vs. State of Bihar, reported in AIR 1966 SC 119. There, the Hon'ble the Supreme Court has very clearly laid down that if a FIR has been filed by an accused person contending his confession then the confessional part would not be admissible in evidence. It is also observed in very clear terms that even the part relating to motive found in the FIR, lodged by an accused, would not be admissible in evidence. The pertinent observations can be gathered from para.13, which are reproduced for ready reference as under :

Para.13

> Now, a confession may consist of several parts and may reveal not only the actual commission of the crime but also the motive, the preparation, the opportunity, the provocation, the weapon used, the intention, the concealment of the weapon and the subsequent conduct of the accused. If the confession is tainted, the taint attaches to each part of it. It is not permissible in law to separate one part and to admit it in evidence as non-confessional statement. Each part discloses some incriminating fact i.e. some fact which by itself or along with other admitted or proved facts suggests the inference that the accused committed the crime, and though each part taken singly man not amount to a confession, each of them being part of a confessional statement partakes of the character of a confession. If a statement contains an admission of an offence not only that admission but also, every other admission of an incriminating fact contained in the statement is part of the confession.

15. Therefore, in view of the aforesaid decision of a larger bench of the Hon'ble the Supreme Court, it would not be possible for this Court to hold that the FIR contending the admission of the accused with respect to motive would be admissible though a different view has been taken in the case of Bheru Singh S/o Kalyan Singh Vs. State of Rajasthan (supra). In other words, the FIR filed by accused no.1 before the police would be admissible only for the purpose of holding that the said FIR was filed by her. This can be gathered even from the para.20 of the decision in the case of Aghnoo Nagesia Vs. State of Bihar (supra), wherein it has been laid down that with respect to identifying the accused as the maker of the FIR and for the purpose of discovery under Section 27 of the Evidence Act, the FIR would be admissible, but for the remaining facts, the entire FIR must be excluded

from the consideration. In the present case, we can consider the FIR filed by accused no.1 before the police station and produced on record during the trial would be admissible for the purpose of holding that the FIR was filed by accused no.1. It may also relevant for the purpose of discovery made by her in respect of the dead body from a pit by the side of the temple just near the her house. For rest of the facts, the FIR cannot be read to any extent.

16. A decision in the case of Aghnoo Nagesia Vs. State of Bihar (supra) has been followed in a subsequent decision in a case of Khatri Hemraj Amulakh Vs. State of Gujarat, reported in AIR 1972 SC 922. There also the motive part of FIR, lodged by the accused, was required to be overlooked. However, with respect to other aspects, the FIR was found to be relevant and admissible particularly with respect to discovery under Section 27 of the Evidence Act.

17. It is also required to be considered that the fact as to whether the accused was in actual custody of the police at the time of filing the FIR is almost irrelevant. Therefore, even if formal arrest was not made at the time of lodging the FIR by the accused persons and even if the maker of the FIR becomes accused person subsequently then also the confessional part of the FIR would become inadmissible in view of the decision of the Hon'ble Supreme Court rendered in the case of Aghnoo Nagesia Vs. State of Bihar (supra). At the same time, it would be relevant to consider a decision in the case of State of Maharastra Vs. Suresh (supra). In Paragraph No.26 of the said judgement, it has been observed that three possibilities are there when an accused person points out the place where a dead body or an incriminating material was concealed without stating that it was concealed by him. One is that he himself would have concealed it. Second is that he would have seen somebody else concealing it and third is that he would have been told by another person that it was concealed there. It has been further observed that if the accused declines to tell the Criminal Court that his knowledge about the concealment was on account of one of the last two possibilities, the criminal court can presume that it was concealed by accused himself. This is because the accused is the only person who can offer the explanation as to how else he came to know of such concealment and if he chooses to refrain from telling the court as to how else he came to know of it, the presumption is well justified course to be adopted by the criminal court that the concealment was made by him.

Such an interpretation is not inconsistent with the principle embodied in Section 27 of the Evidence Act.

18. In the present case, we find that so far accused no.1 is concerned, she has categorically stated to the police in presence of Panchas that she had concealed the dead body of the deceased by the side of the temple which is near her house, and then she led the Pnachas and police to the said temple. The wooden pieces and other materials were removed at her instance from the place shown by her and a pit was dug and therefrom the dead body of the deceased was taken out. She had identified the dead body of the deceased and apart from that statement of accused no.1, the fact is that the dead body has been identified by other persons also. Accidently or incidentally the brother of the deceased i.e. Parshaottamgar was also present at that time and he also identified the said dead body to be the dead body of the deceased. Even the son has also identified the dead body and has further stated that the knicker found from the said pit was the knicker of the deceased. The son of accused no.1 has also explained that the deceased used to take bath putting on the said knicker and thereafter, he (son of accused no.1) used to place it on a wire for drying the same. Even during the course of trial and during the course of hearing of these appeals, it is not in dispute that the dead body found was really the dead body of the deceased. The cloths found from the said pit along with the said dead body further show that it was a dead body of the deceased.

19. It is also required to be considered that the said temple is hardly at a distance of about 41 feet from the residence of the deceased wherein accused no.1 and her children were staying with the deceased at the time of incident. The surrounding fields are shown in the sketch, Exh.37 from which it does not appear that there is any other residential house near to the said temple. This would clearly show that the said pit by the side of the temple was very easily accessible to the persons staying in the said house, occupied by accused no.1. It is also required to be considered that the son of accused no.1 had inquired on the next day about the whereabouts his father, at which accused no.1 told him that the father had gone for the purchase of a truck. Then again she has made a different statement to the brother of the deceased i.e. Parshottamgar to the effect that the deceased had come before about 15 to 20 days and she had taken Rs.1500/- and then she made a statement that the deceased had come and had collected a very large amount. This inconsistent stand and explanation on her part would

also be an incriminating circumstance against accused no.1. The said statement of accused no.1 is also inconsistent with the medical evidence on record which clearly shows that the deceased may have died in a span of one to three months. The said opinion was obtained in the last week of August,1991 which would clearly mean that the deceased must have died after third week of July,1991 and not earlier than that. The deceased was missing from 1.7.1991. This would clearly mean that the deceased could not have been alive on 15th or 20th July,1991 and, therefore, the statement made by accused no.1 before her son and before Parshottamgar would be totally incorrect. This would clearly show that accused no.1 had actually mislead her son as well as Parshottamgar on the point.

20. It is also required to be seen that there is evidence to show that accused no.1, with one another person, had gone to sell the motor car, purchased by the deceased. It would be relevant to note that the motor car was left at repairer's place by the deceased and thereafter, accused no.1 with one another person had actually gone to said repairer and made an offer for the sale of the said motor car. Incidentally, the said motor car did not stand in the name of either of those two persons and, therefore, the sale transaction could not take place. This can be gathered from the evidence of PW 14 Rajendra Bahadursingh, Exh.44. It is required to be considered here that the presence of accused no.2 has not been fully and satisfactorily established since it is not specifically brought out during the course of his evidence that accused no.2 was the person who accompanied accused no.1. However, so far accused no.1 is concerned, the witness has very clearly deposed before the trial Court that he knew the deceased and he had given the said car for certain body work. That thereafter, accused no.1 had come to him in company of another person and had told him that the car was not to be repaired, but it was to be sold. This also shows that accused no.1 had made an attempt to sell the car and get the cash amount, probably, on a consideration that when the deceased was no more, it would not be useful to keep the car with her. This conduct on her part, in absence of the deceased, would also show her involvement in the commission of an offence of murder of the deceased. Even otherwise, there was no necessity for her to go for the sale of the said motor car in the company of some one else when the owner of the said motor car i.e. deceased was not there with her, and when he had not returned for a long time. This conduct on her part is one of the circumstances weighing against her.

21. As said above, the place where the dead body was buried is hardly at a distance of 41 feet from the residence of accused no.1 which can be gathered from the sketch, Exh.37, at page-259 of the paper book. This factual aspect was not in dispute before us. The said place of the temple as well as the residence of accused no.1 is surrounded by other fields which shows that no other residential houses are there in the near vicinity. This clearly shows that none else could dare to enter the said place near the said temple to bury the said dead body of the deceased by the side of the temple. It would be seen that the blood stains have been found at and around the otta of the house of accused no.1. Undisputedly, the incident has taken place on the said otta. Looking to the fact that the otta is of the house of accused no.1 and considering the distance of 41 feet between the otta and pit wherein the dead body of the deceased was buried, it can be gathered that this is an additional circumstance to show that the murder was committed by accused no.1 and by none else.

22. It will be required to be considered that ordinarily accused no.2 used to sleep either at the temple or on the said otta of accused no.1. However, the evidence of the son shows that he had made an inquiry from his mother about the whereabouts of the deceased on the next day. This would clearly show that accused no.1 was there in the said house on the evening and on the night during which the murder was committed. However, it is not very clearly established that even accused no.2, who used to sleep there occasionally, was actually found sleeping either on the otta of the temple or on the otta of accused no.1. This would also raise a doubt with respect to the presence of accused no.2 at the time of commission of the offence and, therefore, accused no.2 would naturally be entitled to the benefit of the said reasonable doubt. Even the discovery of axe by accused no.2 is a weak piece of evidence and it has not been clearly established that accused no.2 had told the Panchas and police that he had concealed the said axe at a particular place.

23. On this point, it would be relevant to consider a decision in case of Kana Mohan Sutar Vs. State, reported in 1984 (1) GLR 78. There, it has been observed by this Court that in the instant case, the accused led the police and panchas to his residence and discovered the axe which is the muddamal article certified by the serologist as containing blood. That the witness does not say that the accused stated that he had concealed the

muddamal axe and that he was willing to discover the same. That in the absence of such a statement by the accused, it is not sufficient for the prosecution to show that the accused discovered the axe. That the accused may have knowledge of the weapon concealed by some one else at a particular place and he may discover it but unless there is reliable evidence that the accused had concealed said same weapon, it would not be linked with the alleged offence.

24. On this aspect, it would also be relevant to consider a decision of the Hon'ble the Supreme Court in the case of State of Maharastra Vs. Suresh (supra). It would be relevant to state here that so far accused no.2 is concerned, he has not explained before the trial Court at any point of time including his statement under Section 313 of the Code that he had seen somebody concealing the said axe at the place from where it was discovered. He has also not explained that somebody had told him that the axe was lying there. Therefore, when the said two statements have not been made by him, even as against the accused no.2 evidence of discovery of axe would be relevant considering the previous statement made, under Section 27 of the Evidence Act in terms of the decision reported in (2000) 1 SCC 471 (supra).

25. At the same time, it is well settled that the evidence of discovery of an incriminating article made by an accused person is considered a weak evidence, and it would be difficult for the court of law to base conviction of an accused person making discovery under Section 27 of the Evidence Act solely on the basis of evidence of discovery.

26. So far accused no.1 is concerned, she has also not rendered any explanation as to how she knew about the concealment of the said dead body in the said pit just opposite her house. She has also not stated that she had seen somebody concealing it or that somebody had told her that the dead body was concealed there. Therefore the aforesaid decision will work against accused no.1. At the same time, it is required to be considered that apart from the evidence of discovery under Section 27 of the Evidence Act, there is other circumstantial evidence on record which would go to show that she had actually committed offence or that the offence of murder of the deceased was committed at her instance. Therefore, this decision will naturally be important for the purpose of showing that the discovery has been established and the discovery made by accused no.1 with respect to dead body of the deceased is an important circumstantial evidence

against accused no.1.

27. The trial Court has also considered certain aspects during the course of the judgement to hold that the accused persons are guilty for the offence stated to have been committed by them. The said observations of the trial Court can be gathered at page-59 of the judgement in paragraphs nos. 58, 59 and 60. The trial Court has also considered certain aspects of the FIR which are required to be overlooked or ignored in view of the aforesaid decision of the Hon'ble the Supreme Court reported in AIR 1966 SC 119 (supra). Same way, the observations made by the trial Court with respect to accused no.2 on the basis of discovery and other conduct will also be required to be ignored in view of the fact that the said conduct of discovery cannot lead the Court to record conviction of the accused.

28. So far discovery of dead body is concerned, PW 1 Rajubhai Bhagawandas, Exh.11 has given clear evidence which has been supported by evidence of Panchanama, Exh.12. Even the Executive Magistrate has also given evidence to the effect that the dead body was discovered at the instance of accused no.1. Even the brother of the deceased, Parshottamgar, has also supported the said aspect as he was incidentally or accidently present at the time of discovery. Therefore, the fact of discovery of the dead body has been amply established on record through the evidence of independent witness including evidence of PW 1 Rajubhai Bhagwandas, Exh.11.

29. Then the blood stains at the place in question were also traced out and PW 3 Jaymal Rajubhai, Exh.17 has also proved the said fact and the Panchnama has been drawn at Exh.18 and the contents of the Panchanama have been proved by the said witness. The reports of the chemical analyst and serologist also make it clear that there was human blood and it contained blood group which was also the blood group of the deceased. An attempt was made to show that there is no evidence with respect to blood group of the deceased. However, it is a matter of record that the blood on the cloths and other things of the deceased was also collected and it contained group-A. The blood at the place of the temple and otta was also collected and it also belonged to Group-A which clearly established that the blood group found on otta and the temple and the group of blood of the deceased are the same.

30. An attempt was also made to show that the paper cutting was found in possession of accused no.2 when he

was arrested, and it contained a news item with respect to the fact that the deceased was missing. Mere possession of the paper cutting by accused no.2 by itself would not be sufficient to hold that he preserve the same since he was guilty of committing murder of the deceased. This would be a weak piece of evidence which cannot lead to the conviction of accused no.2. Then shirt and pant of accused no.2 were seized under a Panchanama, Exh.32 and PW 31 Amid Khamisa Chavada has also given evidence about the same. But, it is a matter of record that these two cloths were not found stained with blood and blood was not found during the course of chemical analysis of these two clothes. Therefore, this is not an incriminating circumstance against accused no.2.

31. PW 12 Parshottamgar, Exh.39, who is elder brother of the deceased, has clearly stated that accused no.1 had attempted to sell motor car of the deceased on 10.8.1991. It is also his evidence that he had seen two accused enjoying video film on the VCR and the VCR and cassette were brought by accused no.2 in the company of son of the accused no.1. This conduct on the part of accused no.1 will also be relevant for an appropriate consideration. However, merely because accused no.2 had brought the VCR and cassette will not be sufficient to hold that accused no.2 was involved in the offence of committing murder of the deceased. At the same time, it is not much in dispute that the deceased was missing since 1.7.1991 and so many days had gone and thereafter, accused no.1 was found enjoying the video film show. It is more so when the video film and the VCR were called for through accused no.2 and accused no.2 was also witness of the said film show. In other words, accused no.1 was found witnessing the said film show in the company of accused no.2. This would again lead to some sort of motive on her part.

32. It is also required to be considered that thereafter Parshottamgar submitted an application to the PSI, Adipur on 14.8.1991. Thereafter also, he continued to remain in touch with the police station complaining about the missing of the deceased. Time and again, he approached the police station and tried to bring out the correct position. An attempt was made to argue that the deceased had sold an ancestral property and PW 12 Parshottamgar had an eye on the said property and, therefore, even he might have committed murder of the deceased. It is not on record as to whether the share of PW 12 Parshottamgar was sold by the deceased. Even if there was ancestral property, the question of grievance would arise only if the share of Parshottamgar was

disposed of by the deceased. There is nothing on record to show that the deceased had disposed of the share of PW 12 Parshottamgar, Exh.39 in the said property. It has also been argued that if the deceased is no more, the property would go to Parshottamgar. That is also not a correct position. The deceased had four children and wife. Therefore, even if the deceased is no more, the property would be inherited by wife and the children and it would not go to parshottamgar. There is no evidence on record to show that PW 12 Parshottamgar, brother of the deceased, had any reason to keep an eye on the property of the deceased. Therefore, the involvement of Parshottamgar has to be ruled out. Therefore, there is absolutely nothing on record to connect Parshottamgar with the offence in question. Otherwise conduct of Parshottamgar would have been different, and if he was involved in the offence in question, he would not have reported the matter to the police twice, as has been done by him. He could have done something to take possession of the property of the deceased when it was noticed that the deceased was missing since 1.7.1991. He would have made some application for mutation of the land in his name. Some other tactics would have been made by him. But, nothing has been done by him even till now. This would indicate that PW 12 Parshottamgar, brother of the deceased, had absolutely no interest in the property of the deceased.

33. Then he had said that son Kirangar had informed him about the illicit relationship between the two accused persons. It is true that the statement of Kirangar was not recorded by the I.O. after the offence was registered against the accused persons and after the dead body of the deceased was discovered by accused no.1 as said above. Therefore, the son of accused no.1 had no occasion to show anything about the illicit relations between two accused. At the same time, when the statement of son of accused no.1 was not recorded subsequent to the recovery of the dead body, even his evidence about illicit relationship between two accused can become a weak piece of evidence. At the same time, it cannot be said that there was no evidence on record to show that there was motive for accused no.1 to commit the crime in question. When police station was contacted twice and nothing had happened, PW 12 Parshottamgar contacted the DSP also in order to find out the whereabouts of the deceased. Then, it is also required to be noted that accused no.2 was found missing after some days and thereafter, even accused no.1 was also found missing when Parshottamgar made complaint to the police alleging about illicit relationships between the

two accused persons. It is true that the statement of accused no.1 made by her in her FIR to the effect that she was moving in the company of accused no.2 at different places like Anjar, Dragh, Rapar etc. would not be required to be considered for any purpose since the said statement would lead to her confession to the occurrence of offence and, therefore, the said statement is required to be ignored.

34. But, the fact remains that PW 12 Parshottamgar has very clearly deposed before the trial Court that accused no.2 was found missing and thereafter even the accused no.1 had also run away. Then the said fact is supported by the evidence of advertisement published in newspaper by the relative of accused no.1 to the effect that accused no.1 was found missing. The said fact of the public notice has been brought on record. If accused no.1 was totally innocent and she was not involved in the offence in question, she had no reason to run away after the incident in question and after the police started some sort of inquiry and when the allegations made by PW 12 Parshottamgar about the alleged involvement of the accused. Therefore, the aforesaid circumstances clearly show that the PW 12 Parshottamgar, Exh.39 was never involved in the offence. But the aforesaid conduct of accused no.1 clearly indicates that she was a member of the party which committed murder of the deceased. Even if it is found that accused no.2 is not proved to have committed the offence in question then it is to be held that the accused no.1 in the company of some one else who committed the said offence or atleast actively participated in the said occurrence and abated commission of the said offence and that offence of murder has actually been committed at her instance. Even PW 13 Dahya Kana, Exh.43 has stated that accused no.1 had told him that the deceased had come and collected Rs.1500/- before about 15 to 20 days. Since the expert's opinion on record shows that the death of the deceased must have been taken place before one to three months, the aforesaid circumstance is inconsistent with the said opinion as the deceased would not be alive by 15th to 20th July 1991 and, therefore, the said explanation on her part clearly amounts to be a false explanation for the absence of the deceased in the house and in the village.

35. So far discovery of the dead body is concerned, it has been clearly established by PW 15 Bhajansingh Khalasa, Exh.45 and the said evidence has stood the test of cross-examination and yet it has not been taken to any extent. It is more so when the said evidence gets ample

corroboration from the Executive Magistrate who was kept present for the purpose of drawing the said Panchanama as well as for drawing inquest report.

36. An argument was advanced to the effect that when the fact of concealment of dead body in the said pit was already disclosed to the police then it cannot be treated to be a discovery within the meaning of Section 27 of the Evidence Act. It is not possible to accept the said argument. The police would call the Panchas only when the accused person expresses his desire to discover a particular article. The Panchas were called and accused no.1 did make a statement in their presence that she had concealed the said dead body of the deceased in a pit by the side of the temple and she was prepared and willing to discover the same. Thereafter, the police and panchas followed her to the said place where the dead body of the deceased was concealed. In view of the above position, it cannot be said that the evidence of discovery of the dead body of the deceased from the place in question at the instance of the accused no.1 is not required to be considered by this Court and it should be over looked. The position would have been different if the aforesaid statement was made by accused no.1 in presence of police only and was not reiterated by her in presence of Panchas. Here accused no.1 again narrated the said fact in presence of Panchas and therefore, it has to be held that the requirement of Section 27 of the Evidence Act have been satisfactorily complied with and, therefore, the discovery of the dead body of the deceased has been established by the prosecution. Here also the point arises that she has not explained as to how she came to know about the concealment of the dead body of the deceased at the said place. In absence thereof, an inference and presumption has to be drawn against accused no.1 as laid down in (2000) 1 SCC 471 and the inference and the presumption is that the concealment was made by her. When the said dead body of the deceased was concealed by her in a pit which is 41 feet away from her residence then it is a matter of further inference that the murder did take place in her presence with her participation and by or at her instance.

37. Therefore, so far accused no.2 is concerned, it is not proved beyond the reasonable doubt that he had committed the murder of the deceased. His presence at the time of the occurrence has not been fully established and the evidence of discovery of axe said to have been made by him cannot be treated sufficient evidence in order to hold him guilty. Therefore, he would be entitled the benefit of reasonable doubt.

38. It has come on record that so far accused no.2 is concerned, he was working as a watchman in respect of surrounding fields, and he used to sleep either at the otta of the temple or on the otta of the house of accused no.1. When this fact was there it would be reasonably inferred that the people in the surrounding area would have known the said fact that accused no.2 was normally sleeping at the aforesaid two places. The aforesaid house of accused no.1 was occupied by accused no.1 and her children during the life time of the deceased and even the deceased was also staying there. In that view of the matter and particularly when the said places are surrounded by other agricultural land, as mentioned in the sketch, Exh.37, none else would dare to enter the said place even at night hours to conceal the said dead body of the deceased and bury the same by the side of the temple after digging a pit there. Therefore, it would naturally be inferred that if someone comes to conceal the dead body there then, it would be noticed by accused no.2 who normally sleeping at the aforesaid two places. Even otherwise, it would be noticed by accused no.1 staying in the said house and children staying therein. This also shows that it was accused no.1 and accused no.1 alone who did commit the murder of the deceased.

39. It is not much in dispute that the deceased was missing since 1.7.1991. It is also not much in dispute that on the previous evening accused no.1 was there in the said house. It is also in evidence of the son that he inquired from the mother, accused no.1, on the next morning about the whereabouts of the deceased. This fact clearly shows that murder took place only on the said night and on the said night accused no.1 was very much present in the said house. Therefore, this fact and circumstance clearly leads us to hold that it was accused no.1 and accused no.1 alone who has committed the murder of the deceased as aforesaid. In other words, the murder of the deceased was committed either by her or at her instance and in her presence by some one else or that she abated to the commission of the said offence because none else was in a position to do the said job.

40. So far accused no.1 is concerned, by and large, we are in agreement with the reasonings and findings of the trial Court in holding that accused no.1 is guilty for the offence in question. Therefore, it would not be very much necessary for us to reiterate the reasonings and findings for upholding the reasonings and findings recorded by the trial Court. However, when the learned advocate for accused no.1 has advanced the arguments at

length and when certain decisions were cited at bar, we found it necessary to reiterate certain reasons in order to come to a finding that the reasonings and findings recorded by the trial Court are not illegal, unjust and against the evidence on record. Therefore, we have found it proper to place our observations, in a possible brief manner on the record of the case.

41. However, so far accused no.2 is concerned, we find that barring the evidence of discovery of axe, there is no other material to connect him with the crime and as said above, the evidence of discovery is a weak piece of evidence and, therefore, trial Court ought to have ignored the said evidence in absence of any corroborative evidence - direct and circumstantial, and ought to have acquitted the accused no.2 by extending benefit of a reasonable doubt which has not been done by the trial Court and, therefore, to that extent the judgement and order of conviction recorded by the trial Court against accused no.2 is required to be quashed and set aside. It is more so when there is no evidence on record to show the presence of this accused at the residence of the deceased either on the previous evening or on that night or on the next morning. It is true that his conduct to run away after information given to police by Parshottamgar is doubtful but it is not sufficient to hold him guilty for the offence in question.

42. For the foregoing reasons, we are of the view that the trial Court was right and justified in convicting accused no.1 and there is no reason to interfere with the said judgement and order of conviction of accused no.1. Consequently, her appeal deserves to be dismissed.

So far accused no.2 is concerned, the judgement and order of conviction against him cannot be upheld and therefore his appeal is required to be allowed.

43. For the foregoing reasons, Criminal Appeal No.471 of 1995 filed by accused no.1 Manjulaben, widow of Kishorgar @ Naklo Arjan is ordered to be rejected. The judgement and order of conviction with respect to accused no.1, Manjulaben, widow of Kishorgar @ Naklo Arjan for the offences punishable under Sections 302, 201 read with Section 114 of IPC are ordered to be confirmed. This appellant is, at present, on bail. Hence, she shall surrender forthwith. The trial Court shall issue non-bailable warrant against her under intimation to her surety. Her bail bonds naturally stands cancelled.

So far Criminal Appeal No. 245 of 1995 is concerned, the said appeal is allowed with respect to accused no.2, Ramjibhai Ravabhai Koli. The judgement and order of conviction of the trial Court against the said accused no.2 for the offences punishable under Section 302, 114 and 201 of IPC are quashed and set aside and he is ordered to be set at liberty if not required in any other case.

(N.G.Nandi,J.)

(D.P.Buch,J.)

(vipul)